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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN MATTHEW LECLAIRE, Defendant and Appellant.	G050929 (Super. Ct. No. 11ZF0126) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Steven Matthew LeClaire (defendant) of the second degree murder of Marques Murray (count 1), and the attempted murders of his father, Steven LeClaire (LeClaire), and Raymond Eligan (counts 2 and 3). The jury found true allegations defendant personally discharged a firearm causing death or great bodily injury.

The court imposed an indeterminate term of 15 years to life for murder, plus a consecutive 25 years to life for use of a firearm. The court imposed a total determinative term of 11 years and four months for the attempted murders, plus a consecutive term of 25 years to life on each count for firearm enhancements.

Defendant argues the court violated Evidence Code section 1101, and his constitutional rights, by admitting evidence of his prior bad acts. We affirm the judgment.

FACTS

The Shooting

In January 2011, defendant left his post at Fort Bliss, Texas without permission. About a month later, he showed up at LeClaire's room in the Cypress Lodge in Cypress, California. Defendant did not tell LeClaire about leaving the Army. He said he was there for a short visit, and he intended to sell his nine-millimeter handgun and go live with his friend, Steven Gedney, in Portland, Oregon.

LeClaire said everything seemed fine for a couple of weeks. Defendant was jovial, and he had no problems with the other Cypress Lodge residents. On February 24, defendant helped Eligan, LeClaire's friend, move into LeClaire's room. Later that evening, Eligan, LeClaire, defendant, and Murray, another Cypress Lodge resident, gathered at around 6:00 p.m. to watch a basketball game in LeClaire's room. Around 9:00 p.m., defendant left LeClaire's room to visit a woman in another room. He returned about 10 to 15 minutes later, retrieved his handgun, and locked the front door.

LeClaire heard Murray say, "Ray," right before defendant shot Murray four or five times. As LeClaire tried to stand, defendant shot him several times. Defendant then turned toward Eligan and said, "I told you not to move." Eligan did not move, but defendant shot him in the left knee and thigh. As Eligan ran to the bathroom, defendant shot him in the right calf. Eligan managed to escape and lock the bathroom door, but he heard more gun shots.

Carlos Sanchez, an off-duty patrol officer with the California Highway Patrol, was eating at a nearby restaurant when he heard gun shots. As Sanchez walked through the restaurant parking lot toward the noise, he saw defendant walk out of a room full of white and gray smoke, and the sound of an activated smoke detector.

Sanchez commanded defendant to get down on the ground, and defendant complied. Another officer handcuffed defendant and escorted him to a patrol car. At one point, defendant blurted out, "9 millimeter Beretta," but he did not appear to be under the influence of alcohol.

In LeClaire's room, officers found Murray's body lying face down on the floor, surrounded by bullet casings. LeClaire was lying on a bed, bleeding from his waist and buttocks, and there was a black, nine-millimeter Beretta with an empty magazine nearby. Eligan was standing against a wall, and he appeared to be in shock.

Defendant's Statement

Defendant was arrested and transported to the Cypress Police Department. In the early morning hours of February 25, he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) and answered questions. Defendant told officers he was active duty Army, stationed at Fort Bliss, Texas, but he had just served 14 months in Baquba, Iraq. He had been diagnosed with posttraumatic stress disorder (PTSD), which causes flashbacks, vivid dreams, anger issues, anxiety, and memory problems, and he had been hit with an incendiary explosive device (IED). Defendant admitted killing three people in Iraq, and he said his life was "already fucking over." He instructed the officers

to call the Fort Bliss Hospital, and he offered his Social Security number, and the name of his commanding officer.

Defendant said he was a little disoriented, and he wanted to know "what . . . damage or . . . collateral damage" he caused. He called the shooting an "episode." He explained that he was visiting his father while he waited for a medical discharge from the Army. He admitted drinking four cups of whiskey and Pepsi, which made him feel "buzzed," but he said he was not intoxicated.

Defendant denied having any problems with LeClaire, and he said he liked Eligan and Murray. He did not remember getting into an argument with them. He recalled watching television and then a picture of an AK-47 came to mind. He heard a burst of five-to-seven rounds, but the next thing he remembered was being handcuffed.

Prosecution

Defendant shot Murray 11 times from a distance of about five feet. Murray's blood alcohol content (BAC) was 0.04 percent at his death, and his blood tested negative for drugs.

Eligan testified defendant seemed disoriented and wide-eyed before the shooting. He had once told Eligan he knew how to kill a person by shooting their legs, but Eligan had never felt threatened by defendant. Defendant shot Eligan five times, and Eligan's injuries caused him "incomprehensible" pain, and unemployment.

Like Eligan, LeClaire thought defendant's eyes looked funny, LeClaire said "bright," and that defendant seemed nervous when he came back to the room. LeClaire remembered hearing defendant tell Murray, "you're making me do this," but he was unaware of any prior argument between the two. LeClaire did not see defendant shoot Murray or Eligan. He passed out when he realized he had been shot. Defendant shot LeClaire seven times, and his injuries have forced him to undergo multiple surgeries. He remains unable to walk without pain.

Brittany Whitman, LeClaire's daughter and defendant's sister, testified LeClaire contacted her in September 2010 after about a year with no contact. LeClaire told Whitman, who was then 14 years old, her mother, and her stepfather, that he had stopped abusing drugs and alcohol. Whitman's mother and stepfather arranged for her to visit him at her grandmother's house because LeClaire had told them he lived with his mother.

Shortly after Whitman's stepfather left her at her grandmother's house, LeClaire drove Whitman to the Cypress Lodge. She testified it was trashy and full of "very rude" people. She met some of her father's friends, and he offered her alcohol and marijuana. When LeClaire started making out with two girls in the bathroom, Whitman texted her mother and said she needed help. While Whitman waited for her stepfather to arrive, Eligan grabbed her hand and tried to touch her, and LeClaire and an unidentified woman made lewd suggestions.

Whitman told defendant about the incident a few days later. When defendant came home that Christmas, they talked about it some more. Defendant threatened to "kick [LeClaire's] ass." According to Whitman, defendant frequently mixed alcohol and medication, and he once broke his phone thinking it was a bomb. At a wedding, defendant became very intoxicated and out of control, and he had to be taken home. Later, Whitman heard defendant speak some foreign language, and he screamed, "get down," and demanded his rifle. Whitman's mother and stepfather intervened and locked him in his bedroom until he fell asleep. After the shooting, defendant told Whitman, "You're lucky it wasn't you and mom."

Jason Ammerman, defendant's roommate at Fort Bliss, said defendant took Klonopin, an anti-anxiety medication, and he drank between two and eight glasses of Jack Daniels whiskey, every night. On one occasion, Ammerman walked into their house and noticed defendant was visibly agitated. Defendant said, "I'm going to fucking kill him," and he was referring to LeClaire. Defendant told Ammerman his father was using

Whitman to settle his drug debts, and he hated his father. However, defendant never mentioned having nightmares, or auditory hallucinations.

Dr. Nicholas Asobo, the former medical director of the trauma team of the Brain Injury Clinic at Fort Bliss had an appointment with defendant in 2010. Defendant told Asobo a hand grenade exploded about 10 feet away from him and knocked him unconscious for about 10 minutes. He also said he was in a Stryker vehicle in 2009 when an IED exploded nearby. Defendant asserted the blast caused him to lose consciousness, and he became disoriented. He complained of headaches, irritability, insomnia, blurry vision, ringing in his ears, and balance problems. He admitted drinking a couple beers every night with more on weekends.

Asobo diagnosed defendant as suffering from two traumatic brain injuries, and prescribed medications for migraine headaches and anxiety. However, Asobo testified a fragmentation grenade exploding 50 to 100 meters away from a person might not cause sufficient shaking of the brain tissue to cause damage. In addition, Asobo said that while every soldier returning from oversees receives a post-deployment screening, there is no effort to verify the facts as recounted by the soldier, and there is lot of malingering.

Tammy Wolfley, a relative of defendant's ex-wife, accompanied defendant to his medical appointment with Asobo. At the time, defendant did not complain of PTSD before the visit. After his appointment, however, defendant said, "I ha[ve] PTSD, and if I were to go down and shoot whatever, it would be perfectly understandable, because of things I've witnessed in Iraq." Defendant also told Wolfley he could claim insanity if he ever shot someone.

Sergeant Jason Jones served with defendant in Alaska, and during their deployment to Iraq between September 2008 and 2009. Jones testified defendant's unit was on a humanitarian mission delivering food and water. They did not engage in combat. The platoon had four Stryker vehicles, and defendant was one of their drivers,

but according to Jones, neither defendant, nor his Stryker, were ever close to an IED. Jones also said defendant had not been hit with shrapnel, nor was he injured. In fact, defendant did not fire his weapon during their deployment.

Defense

At 7:00 a.m. on February 25, defendant had a BAC of 0.10 percent, and he tested negative for drugs. A forensic alcohol expert testified each drink of alcohol raises the body's BAC by 0.02 percent. The body eliminates alcohol at different rates, but a heavy drinker may eliminate alcohol at a rate of 0.015 and 0.03 percent an hour. Based on a hypothetical mirroring the facts of the case, the expert testified a male of defendant's weight (160 pounds) with a BAC of 0.10 percent at 7:05 a.m. on the 25th, and assuming he stopped drinking at 9:34 p.m. on the 24th, and that he was a heavy drinker, the man's BAC at the time of the shooting could have been between 0.24 and 0.37 percent. For about one-half of the population, a BAC of 0.35 percent is lethal.

Defendant's mother, Deborah Lucas, testified defendant started drinking alcohol at around age 14 when she and his father divorced. He was arrested for distributing marijuana before joining the military at age 18. Lucas thought defendant seemed confident and happy in the military, but that changed after he was deployed to Iraq.

When defendant came home at Christmas, he and his mother went shopping. A little girl screamed, and defendant reacted. He was shocked and angry, and they had to leave the store. After defendant got drunk at a wedding and had to be driven home, Lucas yelled at him and he responded by telling her to "get on the fucking floor." He asked for his gun, and he sliced his hand across his throat.

Defendant told Lucas he had strange feelings, like a bridge was going to collapse. He also walked and talked in his sleep. She heard him give commands like "get down," and "come here." Defendant told Lucas he had PTSD, and that he had been

hit in the head with shrapnel. She had seen him take Maxalt for migraines and Xanax for anxiety.

Steven Gedney met defendant in 2007 when both men were stationed at Fort Wainwright, Alaska. They lived in the same barracks and became close friends. Gedney was dishonorably discharged from the Army, and he was living and working in Portland, Oregon, at the time of trial.

Gedney testified defendant drank 12 to 18 beers everyday when they were together in Alaska. During this time, defendant told Gedney he dated two girls from a homeless shelter, and he brought them to the barracks for sex. Defendant also said that on one drunken occasion, he put a gun in his girlfriend's mouth because she slapped him in the back of the head.

According to Gedney, defendant did not get along with many people, including his relatives, but he was close to his father. When defendant returned from Iraq, he told Gedney that his helmet had been shot off his head, and he had been diagnosed with PTSD. In February 2011, defendant told Gedney about his plan to sell his nine-millimeter Beretta and move to Portland, although Gedney's living arrangements were in flux at the time.

Ronald Fielder, an Army Staff Sergeant who lived and worked with defendant between 2010 and 2011, testified defendant seemed generally happy and did his work. Fielder was with defendant when defendant bought his nine-millimeter Berretta. Fielder knew defendant drank alcohol every day, and more on the weekends. Fielder recalled that one night after he and defendant had been out drinking and were driving home, defendant blurted out, "No, don't go down that way. It's an ambush," and then started to cry.

Dr. Ari Kalechstein, a licensed psychologist, testified as a defense expert. He reviewed defendant's school, medical, and military records, police reports and jail records, interviews with relatives, and defendant's phone records. In addition, he twice

met with defendant and spent a total of four and one-half hours with him. Kalechstein did not perform any standardized tests, however, because defendant did not claim to be suffering from mental illness.

Defendant told Kalechstein he arrived at his father's room on the way to Oregon. He knew and liked Eligan and Murray. On the night of the shooting, defendant tried to have sex with a woman in another room, but she threatened to call the police. Defendant remembered leaving his loaded gun on a nightstand in his father's room, but he did not remember getting his gun before shooting. Defendant did remember that Murray told him, "you're a freak on a leash, and if the cops come I'm going to report you myself."

Defendant said Murray cold cocked him in the right side of the head. Defendant responded, "fuck you," and started shooting. Defendant admitted shooting Murray in the chest, due to his Army training. He said he shot Eligan in the knees to disable him. Defendant also put the gun to his own head. His father screamed at him, and defendant said, "'Fuck you too,' closed [his] eyes, and started shooting." Someone tackled him and knocked him unconscious. He remembered Murray begging him not to shoot, but he did not realize what he had done until the shooting stopped. Defendant denied premeditating, or planning, to kill Murray, his father, or Eligan. He said, "I was scared and I snapped."

Kalechstein testified no data supported giving defendant a PTSD, or traumatic brain injury (TBI) diagnosis. In Kalechstein's view, defendant's problem was alcohol. He explained how alcohol impairs the central nervous system, and impairs function of the temporal lobe, which involves memory, and governs conduct and decision making. A person may have impaired judgment, and yet be able to move and engage in goal directed activity.

According to Kalechstein, a chronic drinker would be more likely to be able to attain a 0.35 or 0.36 percent BAC, but the more intoxicated a person gets, the

more likely they will not think before they act. Given a set of hypothetical's mirroring the facts of the crime, including defendant's age, heavy drinking, deployment to Iraq, flashbacks, headaches, nightmares, use of psychotropic medication, and a BAC of 0.35 or 0.36 percent, Kalechstein believed the critical factor would be the level of alcohol intoxication. Kalechstein opined the hypothetical person would be unconscious with a 0.35 percent BAC.

Rebuttal

Dr. Veronica Thomas, a forensic psychologist, testified defendant should be diagnosed with both alcohol use disorder and antisocial personality disorder. She said a person with a 0.25 percent BAC would be very intoxicated and cognitively impaired, while a person with 0.35 percent BAC would have gross motor impairment, or even unconsciousness.

DISCUSSION

1. Background

The defense offered Gedney's testimony to confirm defendant's intent to sell his gun and move to Oregon. The court overruled the prosecutor's hearsay objection under the state of mind exception (Evid. Code, § 1250). The prosecutor then pointed out that if Gedney's testimony about defendant's moving plans were admitted, "I guess we go through all the other conversations that they had and all the other stories."

Defense counsel objected on hearsay and Evidence Code section 352 grounds to the following three statements defendant allegedly made to Gedney: (1) defendant had become drunk and angry with his then-girlfriend and put the muzzle of a pistol in her mouth, (2) he found women at a homeless shelter and exchanged pizza for sex with them, and (3) he dropped his girlfriend's baby. The court admitted the first two statements as party admissions (Evid. Code, § 1220), although Gedney denied saying defendant exchanged sex for pizza. The court excluded evidence of the third statement as more prejudicial than probative. (Evid. Code, § 352.)

2. Analysis

Defendant now asserts all of Gedney's testimony was inadmissible character evidence. (Evid. Code, § 1101, subd. (a).) Defendant forfeited this claim by failing to object on this ground at trial. (See *People v. Doolin* (2009) 45 Cal.4th 390, 434 [failure to object on Evidence Code section 1101, subdivision (b) grounds constitutes forfeiture of contention on review].) But even if the claim was not forfeited and assuming Gedney's testimony was inadmissible character evidence, we find no prejudice.

Gedney's testimony was brief and inconsequential given the overwhelming evidence of the crimes recited above. Thus, it is not reasonably probable defendant would have achieved a more favorable result absent asserted error. (*People v. Welch* (1999) 20 Cal.4th 701, 750, [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 to violations of Evidence Code section 1101].) For the same reasons, we reject defendant's argument that the admission of this evidence violated his due process rights. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 ["[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]"].)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

I CONCUR:

O'LEARY, P. J.

ARONSON, J.